[1995] 1 MLJ 20 JANUARY 1995 Reports 81–148

S Constantine v Social Security Organisation (SOCSO) & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 2-220-1992
JAMES FOONG J
29 NOVEMBER 1994

Labour Law *— Employees' social security — Employee boarded out on medical grounds — Whether medical board constituted under Employees' Social Security Act 1969 bound by earlier findings of medical board constituted under Public Officers (Medical) (Chapter 'F') General Orders 1974 — Whether different principles applied by each board — Whether employee entitled to receive disability benefits from Social Security Organisation — Whether employee capable of substantially gainful activity — — Employees' Social Security Act 1969 ss 16 & 17 — Public Officers (Medical) (Chapter 'F') General Orders 1974*

Civil Procedure *— Jurisdiction — Medical boards — Whether High Court could investigate findings of medical boards constituted under Employees' Social Security Act 1969 and Public Officers (Medical) (Chapter 'F') General Orders 1974 — Employees' Social Security Act 1969 — Public Officers (Medical) (Chapter 'F') General Orders 1974*

The plaintiff was employed by the second defendants, Lembaga Pelabuhan Klang, which is a statutory body, until he was medically boarded out on 30 October 1985 pursuant to a finding made by a medical board ('the first medical board') which was constituted by the second defendants under the Public Officers (Medical) (Chapter 'F') General Orders 1974 ('the GO'). The plaintiff then applied to the first defendants for disability benefits under the Employees' Social Security Act 1969 ('the Socso Act') and another medical board ('the second medical board') was constituted. The second medical board recommended that the plaintiff's claim be dismissed as he did not qualify for an invalidity pension under s 17 of the Socso Act. The plaintiff's appeal to an appellate medical board constituted under the Socso Act was also dismissed. The plaintiff applied to the High Court for, inter alia, a declaration that based on the first medical board's decision, the plaintiff was entitled to receive an invalidity pension pursuant to s 17 of the Socso Act and that the first defendants were bound by the findings of the first medical board, and alternatively, against the second defendants, for an order that the second defendants pay him the sum of RM51,768.75 (ie his salary from the date of termination until his official retirement, deducting the gratuity received).

Held, dismissing the plaintiff's claim:

(1) The aim of the first medical board was to determine whether it was in the interests of the second defendant to keep the plaintiff in service or to remove him and this was based on the question of productivity. On the other hand, the second medical board's criteria, as stated in s 16 of the Socso Act, were whether the plaintiff had a permanent disability which had incapacitated him to a degree that he would require medical attention and whether he was incapable of earning at least ⅓ of his salary by gainful activity.

(2) In this case, the plaintiff's injury was of a permanent nature causing him to be unable to walk substantial distances in the wharfs and godowns of the second defendants' port area as he was required to do. Those circumstances only applied to the plaintiff's employment with the second defendants and were not of general application, since the plaintiff could work in another organization which did not involve physical movement. Therefore, the findings of the first medical board were not binding on the first defendants.

(3) The High Court had no jurisdiction to hear the plaintiff's claim by virtue of the provisions of s 84(1)(e), (2)(f), (4) and (5) of the Socso Act. The High Court, being a civil court, had no jurisdiction to investigate into the findings of the second medical board constituted under the Socso Act as the question and dispute were within the exclusive confines of the medical board and its appellate arm.

(4) The court could, however, examine the findings of the first medical board, which was constituted under the GO. However, there was no evidence to show that the findings of the first medical board were wrong. In fact, the plaintiff had accepted its findings without complaint and had accepted from the second defendants the gratuity and benefits due to him. Therefore, the plaintiff's claim for RM51,768.75 was dismissed.

Obiter:

The plaintiff's allegation in the course of the trial that the second defendants had failed to comply with General Service Orders 1/65 was not pleaded in his statement of claim. It had caught the second defendants by surprise and there was no application for amendment to include it. Therefore, the allegation could not be considered.

[Bahasa Malaysia summary

Plaintif telah digaji oleh defendan kedua, Lembaga Pelabuhan Klang, sebuah badan berkanun, sehingga beliau telah ditamatkan perkhidmatannya atas dasar kesihatan pada 30 Oktober 1985 berikutan suatu keputusan yang dibuat oleh sebuah lembaga perubatan

('lembaga perubatan pertama') yang telah ditubuhkan oleh defendan kedua di bawah Perintah-Perintah Am Pegawai Awam (Perubatan) (Bab 'F') 1974 ('PA itu'). Plaintif kemudiannya telah memohon kepada defendan pertama untuk mendapatkan faedah kehilangan upaya di bawah Akta Keselamatan Sosial Pekerja 1969 ('Akta Socso itu') dan sebuah lembaga perubatan yang lain ('lembaga perubatan kedua') telah ditubuhkan. Lembaga perubatan kedua telah mengesyorkan supaya tuntutan plaintif ditolak kerana beliau tidak layak menerima suatu pencen ilat di bawah s 17 Akta Socso itu. Rayuan plaintif kepada suatu lembaga perubatan rayuan yang ditubuhkan di bawah Akta Socso itu juga telah ditolak. Plaintif telah memohon ke Mahkamah Tinggi untuk, antara lain, suatu deklarasi bahawa berdasarkan keputusan lembaga perubatan pertama, plaintif berhak menerima suatu pencen ilat di bawah s 17 Akta Socso itu dan bahawa defendan pertama terikat oleh keputusan lembaga perubatan pertama, dan secara alternatif, terhadap defendan kedua, untuk suatu perintah bahawa defendan kedua dikehendaki membayar beliau jumlah RM51,768.75 (iaitu gajinya dari tarikh penamatan hingga persaraannya yang rasmi, tolak ganjaran yang telah diterima).

Diputuskan, menolak tuntutan plaintif:

(1) Tujuan lembaga perubatan pertama ialah untuk menentukan sama ada defendan kedua seharusnya meneruskan atau menghentikan perkhidmatan plaintif demi kepentingan defendan kedua dan ini berdasarkan soalan daya pengeluaran. Sebaliknya, kriteria lembaga perubatan kedua, seperti yang dinyatakan di dalam s 16 Akta Socso itu, adalah sama ada plaintif mempunyai suatu keadaan uzur yang menyebabkan beliau menjadi tidak berupaya sehingga suatu takat di mana beliau memerlukan rawatan perubatan dan sama ada beliau tidak berupaya mencari nafkah sebanyak sekurang-kurangnya ⅓ daripada pendapatannya melalui kegiatan yang mendatangkan keuntungan.

(2) Di dalam kes ini, kecederaan plaintif yang bersifat kekal itu menyebabkannya tidak berupaya berjalan jarak jauh di dermaga dan gudang di kawasan pelabuhan defendan kedua seperti yang beliau perlu lakukan. Keadaan tersebut hanya terpakai kepada pekerjaan plaintif dengan defendan kedua dan tidak terpakai secara am, kerana plaintif boleh bekerja di organisasi lain yang tidak melibatkan pergerakan fizikal. Oleh itu, pendapat lembaga perubatan pertama tidak mengikat defendan pertama.

(3) Mahkamah Tinggi tidak mempunyai bidang kuasa untuk mendengar tuntutan plaintif memandangkan peruntukan s 84(1)(e), (2)(f), (4) dan (5) Akta Socso itu. Mahkamah Tinggi, sebagai suatu mahkmah sivil, tidak mempunyai bidang kuasa untuk menjalankan siasatan ke dalam pendapat lembaga perubatan kedua yang telah ditubuhkan di bawah Akta Socso itu kerana soalan dan pertikaian itu terletak di dalam linkungan eksklusif lembaga perubatan dan anggota rayuannya.

(4) Bagaimanapun, mahkamah boleh meneliti pendapat lembaga perubatan pertama, yang telah ditubuhkan di bawah PA itu. Akan tetapi, tidak ada keterangan untuk menunjukkan bahawa pendapat lembaga perubatan pertama itu salah. Pada hakikatnya, plaintif telah menerima pendapat itu tanpa membuat aduan dan telah menerima daripada defendan kedua ganjaran dan faedah yang kena dibayar kepadanya. Oleh itu, tuntutan plaintif untuk jumlah RM51,768.75 telah ditolak.

Obiter:

Pengataan plaintif semasa perbicaraan bahawa defendan kedua gagal mematuhi Perintah Perkhidmatan Am 1/65 tidak dijadikan suatu pli di dalam pernyataan tuntutannya. Ia telah mengejutkan defendan kedua dan permohonan tidak dibuat untuk meminda pernyataan tuntutan itu untuk memasukkannya. Oleh yang demikian, pengataan itu tidak boleh dipertimbangkan.]

[*Editorial Note*: The plaintiff has applied for leave to appeal to the Court of Appeal vide Civil Appeal No B–08–229–94.]

Notes

For cases on employees' social security, see 8 *Mallal's Digest* (4th Ed) paras 618, 776; [1992] Mallal's Digest 1139–1140.

Case referred to

Che Noh bin Yacob v Seng Hin Rubber (M) Sdn Bhd [1982] 1 MLJ 80 (folld)

Legislation referred to

Employees' Social Security Act 1969 ss 15, 16, 17, 84

Shahul Hameed Amirudin (*Gomez & Associates*) for the plaintiff.
P Bernard (*Kadir Tan & Ramli*) for the first defendants.
Shahariz Syed Hussain (*Abdullah & Zainudin*) for the second defendants.

James Foong J: The plaintiff was an employee of the second defendants until he was medically boarded out by the second defendants on 30 October 1985. This was pursuant to a finding dated 18 September 1985 made by a medical board (hereinafter referred to as 'the first medical board') constituted by the second defendants. Consequent to this, the plaintiff applied to the first defendants for disability benefits under the Employees' Social Security Act 1969 ('the Socso Act' in short). As a result of this application, another medical board (hereinafter referred to as 'the second medical board') was constituted and, on the 17 October 1986, this second medical board recommended the plaintiff's claim be dismissed for reason that he did not qualify to be a person entitled to invalidity pension benefits in accordance with the provisions of the Socso Act. The plaintiff

then appealed against this recommendation to an appellate medical board which was constituted under the Socso Act and regulations made thereunder. On 16 December 1987, this appellate medical board dismissed the plaintiff's appeal and confirmed the recommendation of the second medical board, thus resulting in the plaintiff receiving no benefits under the Socso Act. These are the circumstances leading to this litigation before this court.

In the plaintiff's statement of claim, the following are prayed for against the first defendants:

(1) a declaration that by virtue of the first medical board's decision on 18 September 1985 obtained by the second defendants that the plaintiff was suffering from invalidity which was deemed to be of a permanent nature, incurable and was not likely to be cured, and in reliance of which the second defendants terminated the plaintiff's services, the plaintiff was within the meaning of the provisions under s 16 of the Socso Act entitling the plaintiff to receive an invalidity pension pursuant to s 17 of the Socso Act;

(2) a determination that the first defendants are bound by the findings of the first medical board convened by the second defendants on 18 September 1985; and

alternatively, against the second defendants:

(1) for an order that the second defendants do pay to the plaintiff the said sum of RM51,768.75 (as calculated in the particulars, which are mainly his salary from the date of the plaintiff's termination of service with the second defendants until the date he was officially supposed to retire, deducting the gratuity he received); and

(2) alternatively, for a declaration that the termination of the plaintiff by the second defendants, on medical grounds, was null and void and of no effect, that the plaintiff was still a senior clerical officer of the second defendants, entitled to all wages, benefits and seniority, effective from 30 October 1985 (the date the plaintiff's services with the second defendants were terminated).

As can be seen from the above, the plaintiff's main claim against the first defendants is for an invalidity pension under the Socso Act, which, according to him, should be based on the findings of the first medical board, and to be accepted by the first defendants.

The findings of the first medical board, whose members were Dr E Peters and Dr Dorairaji, were as follows:

> That the plaintiff is suffering from 'Recurrence of Inguinal Hernia (Direct) with weak lower abdominal wall musoulative. Patient is reluctant to have surgery in view of the past failure.' And that:
>
> (a) the injury is permanent; and
> (b) this causes him not being able to carry out his duty as a senior clerical officer and that the patient be recommended to be medically boarded out.

Relying on these findings, the plaintiff submitted that this should be sufficient to qualify him for the entitlement of an invalidity pension under the Socso Act.

Section 15(a) of the Socso Act provides that an insured person (there being no dispute from all parties that the plaintiff is one), shall be entitled to:

> ... periodical payments to an insured person in case of invalidity certified by a duly appointed medical board or by an authority specified in this behalf by the regulations (hereinafter referred to as invalidity pension); ...

In order to be considered as suffering from an 'invalidity', s 16 of the Socso Act provides as follows:

(1) An insured person shall be considered as suffering from invalidity, if, by reason of a specific morbid condition of permanent nature, he is incapable of engaging in any substantially gainful activity.

(2) For the purposes of subsection (1) —

(a) a morbid condition shall be deemed to be of permanent nature if it is either incurable or is not likely to be cured;

(b) a person shall be deemed to be incapable of engaging in substantially gainful activity, if in consequence of the specific morbid condition of sickness or infirmity, he is no longer capable of earning, by work corresponding to his strength and physical ability which, in view of his training and former occupation, might reasonably be assigned to him at the place of his employment or at a similar place in the neighbourhood or in the same district, one-third of the customary earnings of a mentally and physically sound person with similar qualifications and training;

(c) in determining whether the claimant is suffering from invalidity, account shall be taken of any permanent improvement of the state of his invalidity which results or is expected to result from such measures of physical or vocational rehabilitation as may be offered to him free of charge by the Organisation.

The first defendants argued that the findings of the first medical board could not be binding on them since it was differently constituted and the criteria applied by the first medical board were different from those considered by the second medical board.

The first medical board was constituted under Public Officers (Medical) (Chapter 'F') General Orders 1974 (Perintah-Perintah Am Pegawai Awam (Perubatan) (Bab 'F') 1974). These government civil service general orders (hereinafter referred to as 'the General Service Orders') were adopted by the second defendants as the second defendants are a statutory body. According to DW1, Dr Peters, who was a member of the first medical board, the principles applied by this board in evaluating the plaintiff's medical condition were:

> To determine whether it is in the interest of the employer to keep the patient in service or whether it is better off that he is out rather than in service. This is based also on the question of productivity.

However, the second medical board's criteria were different. These are spelled out in s 16 of the Socso Act itself. DW1, who also sat as a member of the second medical board, summarized in brief the principles applied, which were:

> Whether the patient has disability that is permanent which incapacitated him to a degree that he will require medical attention, and secondly whether if he is capable of being employed in gainful activity where the income he would derive is less than ⅓ he was drawing at that time.

Based on these principles, according to DW1, 'we find that the plaintiff can work as a clerical person in any other company in a similar situation. As such he does not qualify for invalidity pension' under the Socso Act.

It is only obvious that when two different sets of principles are applied to a similar situation, the result may not be identical. As in this case, the plaintiff was medically boarded out by the first defendants because his injury was of a permanent nature causing him, 'not being able to carry out his duty as a senior clerical officer' in the second defendants' establishment. To arrive at this conclusion, the productivity factor was considered. This must be appraised in the context of the type of business and activities the second defendants were engaged in. The second defendants were and are port operators and managers and, according to the plaintiff's testimony, during his employment with the second defendants he was required to walk substantial distances in the wharfs and godowns of the second defendants' port area. This obviously had affected him and was a major factor leading to the conclusion of the first medical board. These circumstances can only apply in the case of the plaintiff's employment with the second defendants. They are not of general application, for the plaintiff can work in another organization which does not involve physical movement. This, therefore, in the opinion of the second medical board does not entitle the plaintiff to invalidity pension under the Socso Act. In order to qualify, the plaintiff's injury must not only be of a permanent nature, but his condition must be such that, 'he is no longer capable of earning, by work corresponding to his strength and physical ability which, in view of his training and former occupation, might reasonably be assigned to him at the place of his employment or at a similar place in the neighbourhood or in the district, one-third of the customary earnings of a mentally and physically sound person with similar qualifications and training'. Besides, the second medical board was formed under the Socso Act while the first under the General Service Orders. Though Dr Peters and Dr Dorairaji sat on both boards, they wore different hats and applied different principles. Under these circumstances, this court is unable to accept the plaintiff's proposition that the findings of the first medical board should be binding on the first defendants.

At the onset of this hearing, the first defendants' counsel raised an objection that this court has no jurisdiction to hear the plaintiff's claim against the first defendants. He based his claim on the provision of s 84(4) and (5) of the Socso Act which reads as follows:

(4) No Civil Court shall have jurisdiction to decide or deal with any question or dispute mentioned in subsections (1) and (2) [of s 84] or to adjudicate on any liability which, by or under this Act, is to be decided by the Board.
(5) No Civil Court shall have jurisdiction to decide or deal with any question or dispute which, by or under this Act, is to be decided by a medical board or by an appellate medical board.

In reply, the plaintiff's counsel submitted that the circumstances of this case do not fit into any of the situations mentioned in s 84(1) of the Socso Act or within any claims stated in s 84(2) of the same Act.

After careful perusal of these sections, this court finds it strange that the plaintiff's counsel has not considered s 84(1)(e) of the Socso Act as applicable to the circumstances of this case. This section reads as follows:

If any question or dispute arises as to —

(e) the right of any person to any benefit and as to amount and duration thereof; ...

The nucleus of the plaintiff's claim against the first defendants is to dispute the first defendants' denial of his rights to an invalidity pension which involves amount and the duration for the purposes of calculation. Invalidity pension is a 'benefit' under the Socso Act and this being the case, will fall exactly within the situation described in s 84(1)(e) of the Act.

Again in respect of the types of claims listed under s 84(2) of the Socso Act, this court is puzzled at the plaintiff's counsel's written submission omitting completely the category of claim under s 84(2)(f) which states as follows:

Subject to the provisions of subsection (3), the following claims shall be decided by the Board, namely:

(f) any claim for the recovery of any benefit admissible under this Act.

Other categories described in s 84(2) of the Socso Act may not have relevance but sub-s (2)(f) contains precisely what the plaintiff is claiming. Under these circumstances, this court finds that it has no jurisdiction to determine the plaintiff's claim against the first defendants.

Besides the above, this court also finds its jurisdiction excluded by virtue of s 84(5) of the Socso Act which read as follows:

No Civil Court shall have jurisdiction to decide or deal with any question or dispute which, by or under this Act, is to be decided by a medical board or by an appellate medical board.

The claim before this court against the first defendants involves question and disputes decided by the second medical board or its appellate division which were constituted under the Socso Act. As clearly defined in this subsection itself, this court being by nature a civil court, has no jurisdiction to investigate into the findings of the medical boards, as the question and dispute are within the exclusive confines of the medical board and its appellate arm. This view is adopted by the Federal Court in the case of *Che*

Noh bin Yacob v Seng Hin Rubber (M) Sdn Bhd [1982] 1 MLJ 80 at p 81, where Hashim Yeop A Sani J by way of obiter accepted Prof Jain's statement in his book, *Administrative Law of Malaysia & Singapore* at p 157, where he said, 'No civil court has any jurisdiction to decide any question which falls within the purview of the Board'.

In the course of trial, the plaintiff alleged that the second medical board which carried out a medical examination on the plaintiff, was held on 31 January 1986 consisting of Dr Peters, Dr Jeya and Dr Paramjit. However, when this board delivered its findings at a second medical examination held on 17 October 1986, Dr Paramjit was absent and he was substituted by Dr Dorairaji. This court presumed that this issue was highlighted for the purpose of inferring the second medical board was not properly constituted.

Before going into the legal aspect of this allegation, both Dr Peters and Dr Jeya have denied that there was a medical examination with the plaintiff on 17 October 1986. There was only one medical examination which took place on the 31 January 1986 and the finding was postponed for delivery on 17 October 1986. From the records produced and the evidence adduced, this court finds no supporting evidence that Dr Paramjit was present in the medical examination held on 31 January 1986 or that he was involved in the delivery of the medical board's decision on 17 October 1986. All evidence lead to only one conclusion, and that is the panel of the second medical board consisted of only Dr Peters, Dr Jeya and Dr Dorairaji.

As for the legal aspect of this allegation, this court finds that it has no relevance to the prayers stated in the plaintiff's statement of claim. There is no legal nexus between this assertion and the relief and remedy sought by the plaintiff. If the plaintiff wishes to declare the second medical board was improperly constituted, then there should be a prayer to this effect. However, there is no such relief sought in this case. In any event, even if there is, it may not succeed in view of the exclusion of this court's jurisdiction over such matters under s 84(5) of the Socso Act.

For reasons stated above, this court hereby dismisses the plaintiff's claim against the first defendants with cost.

As for the plaintiff's claim against the second defendants, it is for a sum of RM51,768.75. No particular facts are stated in the plaintiff's statement of claim to support what cause of action this claim is based on. The only reference in which this court can find some connection to support this claim is para 13 of the plaintiff's statement of claim. It refers to a letter of demand by the plaintiff's then solicitors insisting on the reinstatement of the plaintiff to his former appointment with the second defendants. This letter (inserted as p 36 of the agreed bundle of documents) contented that the plaintiff should not have been medically boarded out by the second defendants since the second medical board constituted by the first defendants had ruled that the plaintiff was, 'not an invalid'. This, therefore, must have been the basis of the plaintiff's cause of action for this specified sum.

The second defendants denied this allegation, and persisted on the fact that the plaintiff was lawfully boarded out on the recommendation of the first medical board in accordance with the rules as set out in General Service Orders 1/82. A copy of this General Service Orders 1/82 is included in the agreed bundle of documents. Also included in this agreed bundle is a copy of the findings of the first medical board, and the letter of termination of the plaintiff's appointment by the second defendants based on the recommendation of the first medical board.

Since the course of action of the plaintiff in this claim is basically that of an incorrect finding by the first medical board leading to the plaintiff being medically boarded out, the only issue for this court's consideration is, whether this finding of this medical board is correct. Unlike the findings of the second medical board which this court has no jurisdiction to examine under s 84(5) of the Socso Act, there is no legal enactment to restrict the powers of this court to examine the findings of the first medical board, which was constituted under the General Service Orders. Nonetheless, in order for the plaintiff to succeed under this claim, he must prove that the finding of the first medical board is incorrect. Except for the contention that the second medical board had declared the plaintiff was not an invalid, there are no other evidence adduced by the plaintiff to challenge the findings of the first medical board being wrong. In fact, the plaintiff has accepted its findings and had not complained or protested to the second defendants for being medically boarded out. He had accepted from the second defendants all the gratuity and benefits due to him. It was only after more than 2½ years later, that when the plaintiff failed to secure an invalidity pension from the first defendants that he conjured this allegation against the second defendants. In any event, it has already been decided that the difference in the two findings of the two medical boards was due to different criteria and principles applied. This does not mean that the findings of the second medical board of the plaintiff do not qualify the plaintiff to be medically boarded out by the second defendants based on the findings of its own first medical board. For these reasons, this court finds the plaintiff's claim for RM51,768.75 must be dismissed.

In the course of the trial, the plaintiff began to introduce evidence to indicate that the second defendants have failed to comply with one General Service Orders 1/65. This, according to the plaintiff, required the second defendants to refer the first medical board's findings to a standing committee set up by the second defendants. This standing committee normally consisted of the chairman and two other board members of the second defendants. If the findings and recommendation of the first medical board were accepted, this standing committee would have issued to the plaintiff a letter of termination. The letter of termination issued to the plaintiff in this case was by the second defendants' general manager. This, therefore, is a breach of the General Service Orders 1/65, and would entitled the plaintiff to be either reinstated or entitled to all his arrears of salaries and benefits as if he was in service until his official retirement.

These are certainly factual grounds but they are not pleaded anywhere in the plaintiff's statement of claim, directly or indirectly. The introduction

of such matters has certainly caught the second defendants by surprise as they could not have traversed upon it in their defence. There were no applications made for amendment to include this factual allegation. Such being the case, this matter has no relevance to the plaintiff's cause of action and cannot be considered by this court. Further, no attempts were made by the plaintiff to tender a copy of this General Service Orders 1/65 into court as an exhibit. Though PW2, a former assistant general manager of the second defendants did testify to the existence of such a practice as alleged by the plaintiff, but to claim that a breach of this General Service Orders would be tantamount to the wrongful dismissal of the plaintiff, must certainly require a careful examination of the contents of these Orders. Without it, this court is unable to consider its effect and implication. Since the plaintiff has to prove his case, failure on his part to tender this significant document is detrimental to his claim on this point.

As for the plaintiff's alternative claim against the second defendants for reinstatement, this court finds no merits for this contention. The second defendants have correctly terminated the services of the plaintiff based on the findings and recommendation of the properly constituted first medical board, and has thus adhered to the rules as set out under General Service Orders 1/82. This being the case, the plaintiff's alternative claim must also fail.

This court hereby orders that the plaintiff's claim against the second defendants also be dismissed with costs.

Claim dismissed.

Reported by Anne Khoo